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Utah Supreme Court

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In the

Supreme Court of the State of Utah

GOODYEAR TIRE AND RUBBER
COMPANY, a corporation, and
HARTFORD ACCIDENT AND
INDEMNITY COMPANY, a cor-
poration,

Plaintiffs,

vs.

Case No. 6250

THE INDUSTRIAL COMMISSION
OF THE STATE OF UTAH and
LEE JAMES HARRIS,

Defendants.

Defendants' Brief

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Defendants' Brief

ISSUES

Plaintiffs assail the finding of the Industrial Commission of Utah, to wit:

“On the 8th day of May, 1939, while employed by the defendant Goodyear Tire & Rubber Company, at Salt Lake City, Utah, while in the course of his duties as helper, applicant sustained accidental injury in the following manner: Being required to work overtime the applicant rode a motorcycle owned

by the Goodyear Tire & Rubber Company to his home for dinner and was accidentally injured on the return trip; the motorcycle became unmanageable, left the road and crashed into the side of a private residence, badly crushing applicant's left leg below the knee; he also sustained contusions of the elbows and lower arms."

They assert that "During the time that employee was absent going to his home, his employment was suspended" * * * and that "He was not injured while on duty nor in his working hours" * * * This issue raises a question of fact that must be determined by an examination of the evidence taken before the Commission. Almost invariably in controversies involving liability of the employer to the employee, conflicts in evidence occur. The Commission that hears the evidence and sees the witnesses is better able than an appellate court to resolve such conflicts. If there is evidence that substantially supports the finding of the Commission, this court will not disturb the ruling of the Commission. Citation of cases to support this proposition is not needed.

Plaintiffs invoke what is commonly called the "going and coming" rule which is frequently stated as follows. The employee gets up in the morning, dresses himself, and goes to work because of his employment; yet if he meets with an accident before coming to the employer's premises, or his place of work, that is not a risk of his occupation but of life generally." The same result obtains generally when the employee has completed his shift and leaves the employer's premises to go to his home, or wherever he pleases, in his own way and for his own purposes. With that rule

applied to an appropriate state of facts, the defendants have no quarrel.

However, the set of facts in a given case differ so greatly from the facts in other cases that the rule cannot be applied blindly. Each case must be ruled upon its facts. This is emphasized by this court in the following case.

Cudahy Packing Company vs. Industrial Commission,
60 Utah 161.

This was the first “going and coming” case decided by this court where a variance from the rule is recognized. While the decision now is looked upon as academic, yet at the time it was considered quite revolutionary. It later received the approval of the Supreme Court of the United State. In a private conveyance deceased was traveling along a highway toward his place of employment. This highway was the only available public way for employees of the Cudahy plant to approach the employer’s premises. It crossed the mainline tracks of two railroads and the court held that the risk of these crossings was incidental to the employment, and although the employee was killed upon these tracks before reaching the place of employment, nevertheless the accident was compensable. In the course of the decision the following paragraphs appear :

“It is not easy and probably not possible or desirable to state any general rule applicable to every condition or state of facts by or under which compensation can be allowed or denied to an employee. Courts are usually controlled by the peculiar facts of each case.”

On rehearing the court again says :

“We reaffirm the statement in the opinion that every case must depend on its own particular facts.”

CITATION OF CASES

Before stating the evidence upon which the Industrial Commission based its ruling that the injury in question arose out of or in the course of the employment, we respectfully call to the court's attention a few illustrative cases taken from the great number of well-considered cases in which Supreme Courts have held against the contention that the going and coming rule applied and have given compensation where the purpose, spirit and liberal construction of the workmens' compensation law, applied to the particular facts in the case, justify granting compensation, altho the hard letter of the rule would seem to shut off that right.

Texas Indemnity Ins. Co. vs. Clark (Texas) 50 So. W. (2nd) 465.

Claimant was one of a gang of employees of the Prairie Pipe Line Company engaged in repairing leaks in the pipeline. On January 11, work was completed in Palo Pinto County and the gang, with the exception of claimant, were transferred to Jack County for work next day. Applicant and two others were ordered, or permitted as variously stated, to remain in Mineral Springs, Palo Pinto County, until morning when they were to report for work in Jack County. Applicant left Mineral Springs early in the morning of January 12 for Jack County and proceeded to search for lodgings. No camp facilities were furnished by employer. While in a private auto searching for a lodging place, applicant was injured in a collision on a public street. The gang went to work at 7:00 as usual the morning of the 12th. Applicant did not work at all that day. Injury occurred after the noon meal.

In holding injury compensable it is stated :

“We think a jury could reasonably conclude under such circumstances that Clark’s act in securing necessary rooming place was incidental to and in furtherance of his duty as an employee of the company.” * * *

Hobson vs. Dept. of Labor & Industries (Wash.) 27 Pac. (2nd) 1091.

Deceased was engaged as watchman or repairman by Greenwood Logging Company, which had suspended operation. His work was 24 hours each day. On the occasion of his death he had gone on a gasoline propelled speeder owned and furnished by the employer, to a point some miles distant to secure groceries, for his own use and which were purchased at his own expense. Objection to an award was on the ground that he was on an errand of his own and not for his employer.

In holding that he was killed in the course of his employment the Supreme Court says :

“The action of Hobson, procuring food supplies, was necessary to the proper performance of his work and constituted no interruption of the course of his employment (24 hours per day as watchman and general repairman). Hence Hobson was engaged in the furtherance of the interests of his employer at the time of the fatal accident. He was killed while in the course of his employment, therefore his widow is entitled to compensation.”

Mackay vs. Dept. of Labor and Industries (Wash.) 44 Pac. (2nd) 793.

Claimant was employed with his caterpillar by the hour in road construction. While working his caterpillar broke

down and he stopped work and took the broken parts some distance to a garage for repairs. While at the garage he was injured. The Supreme Court granted compensation.

“The caterpillar became disabled on the job. The job was not done. The claimant did the natural thing in taking the disabled part at once to the nearest place where it could be repaired to enable him, as speedily as possible, to do the work for which he was hired. We think this was incidental to his employment even though the aggregate amount of his pay was to be determined by the time during which the machine was in operation.”

The court quotes with approval the following language from an earlier Washington case.

“This court is committed to the doctrine that our Workmen’s Compensation Act should be liberally construed in favor of its beneficiaries. It is a humane law and founded upon sound public policy and is the result of thoughtful painstaking and humane considerations and its beneficent provisions should not be limited or curtailed by a narrow construction.”

Michaux, et al. vs. Gate City Orange, etc. Co. (N. C.)
172 So. E. 406.

Deceased, 16 years of age, employed as assistant to the truck driver. On day in question the truck stopped to make a delivery and while the truck was standing still deceased and another negro boy engaged in a fuss about an Eskimo pie. The driver of the truck started off without him when the deceased ran after it, caught the truck and in attempting to climb on it fell and sustained the injury causing his death. Held by the Industrial Commission that “deceased suffered

an accident that arose out of and in the course of his employment."

The Supreme Court of North Carolina ignores the fact that he had left his employment for purposes of his own and that fact was the occasion of his injury. It occurred during his working time and therefore was compensable.

Gilmore vs. Ring Const. Co. (Mo.) 61 So. W. (2nd) 764.

Complainant was employed by the construction company to pour concrete. The work depending upon weather conditions it was the custom for the men to report about 7:30 a. m. for work and if conditions were not right the men would often wait around the job at the request of the foreman until it would be ascertained as to whether conditions changed for the better. It was a custom to have a fire around which the men would assemble for comfort while waiting. On the morning in question claimant reported at 7:30 a. m. and was told weather conditions were not then right and the foreman told him to wait around to see if weather conditions would get better. The men were discussing in jocular mood about some men working Saturday forenoon in violation of a union rule. As a result of some remark by complainant one of the other men grabbed him and shoved him and he fell and broke his leg.

The court of appeals held that he was an employee; that he had reported for work in conformity with the conditions under which the work was being done. His foreman had told him to wait around. He was as much in his line of duty as he would have been if pouring cement.

“We conclude from the undisputed facts in evidence in this case that as a matter of law it should be held that the accident wherein the complainant was injured arose out of and in the course of his employment.”

Industrial Commission vs. Murphy (Ohio) 197 No. East. 505.

Applicant was employed by an undertaking establishment. His work was around the funeral home and occasionally he was required to go to hospitals or homes for his employer. He lived a distance from his place of employment and was by the terms of his employment required at all times to hold himself in readiness for a call for immediate service. His employer must be kept informed day and night of his whereabouts and immediately upon call he was to report to his place of employment. There were no regular hours of employment. On the day of the injury at 6:00 a. m. he received a call that he was wanted and to come in a hurry. He drank a cup of coffee, went to get a street car, which was his ordinary method of travel, and there was injured. It was contended his actual employment did not commence until he reached the funeral home which was the fact and the “going and coming” rule was invoked.

The Supreme Court in granting compensation said:

“We conclude therefore that the defendant in error was injured during and by reason of his employment.”

Chandler vs. Industrial Commission, 55 Utah 213.

“The beneficent purposes of such acts (Work-

mens Compensation) are apparent to all and for that reason if for no other should receive a very liberal construction in favor of the injured employee. We are all united on the proposition that in view of the purposes of such acts, in case there is any doubt respecting the right to compensation, such doubt should be resolved in favor of the employee or of his dependents as the case may be."

The foregoing was written by this Supreme Court in a case where a delivery man, in the morning, on his way to his employer's place of business to start his day's work, delivered a package of meat left from the day before. The defense set up in this case by the insurance company was the "going and coming" rule.

Twin Peaks C. Co. vs. Industrial Commission, 57 Utah 589.

During an interval of leisure the employee in this case was playing with an elevator. The power was shut off to tease another boy and leave him stalled between floors. In turning on the power the deceased was killed. During all the time the deceased was so playing the particular machine on which he was employed was inactive. This court awarded compensation for his death and while this is not a "going and coming" case some of the statements made by the court are quite applicable in the case at bar.

"A careful reading of the decided case will, however, disclose that the mere fact that the injured employee was not in the discharge of his usual duties or was not directly engaged in anything connected with those duties, does not necessarily prevent him

from recovering compensation in case of accidental injury. In that connection it must be remembered that, while a human being may do no more than what a machine might do, yet he cannot be classed as a machine merely."

"While, therefore, in view of all the circumstances in this case, there may be some reason for reasonable minds to differ with respect to whether the accident in question arose out of the employment, yet, in view that we are required to construe the act liberally and with a view to effectuating its purpose, and so as to protect the unfortunate employee, and, in case of his death, those who are dependent on him for support, we feel constrained to hold that the accident in question arose in the course of the employment."

Utah Apex Mng. Co. vs. Industrial Commission, 67 Utah 537.

While this is not a "going and coming" case the injury in question occurred after working hours and issue was raised as to whether or not it arose out of the employment.

The court approves the following definitions:

"The expressions 'arising out of' and 'in the course of' the employment are not synonymous; but the words 'arising out of' are construed to refer to the origin or cause of the injury, and the words 'in the course of' to refer to the time, place and circumstances under which it occurred. An injury which occurs in the course of the employment will ordinarily but not necessarily, arise out of it, while an injury arising out of an employment almost necessarily occurs in the course of it."

EVIDENCE UPON WHICH THE INDUSTRIAL COMMISSION BASED ITS HOLDING THAT THE INJURY AROSE OUT OF OR IN THE COURSE OF THE EMPLOYMENT.

In stating the evidence upon which the Commission based its holding we are mindful of the admonition written by Judge Thurman in the case last above cited:

“It is an established rule in this jurisdiction, based upon mandatory statute, that on writ of review, the court will not disturb the Commission’s findings if there is any substantial evidence to sustain them. Further, that the court will not review the evidence and pass upon its weight. So that it is love’s labor lost and time wasted for counsel, in argument, to devote time and space in discussing evidence in conflict with the evidence upon which the award was made.”

Applicant, 19 years old, was in the employ of the defendant tire company on the day in question. He worked as an extra man in the service department, which included the lubrication department and the actual mounting of tires (Tr. 1, p. 26). His regular hours were from nine o’clock a. m. to six o’clock p. m., with a lunch hour off at noon. The injury occurred on the sixth day of his employment. On previous days he finished the day’s work around 6:30 p. m. His wages were \$2.50 per day. (Tr. 1, p. 20.) On the day of the injury he was required to stay on for extra work continuing directly from the end of his regular shift. At the outset the length of the overtime was estimated by the foreman at four hours. Which would mean until 10:00 or 10:30 p. m.

Evidently the job lengthened as time went on. Nothing was said about an opportunity to eat until about 8:00 o'clock. At that time applicant was loosening bolts on the wheels of a truck and delay had occurred in procuring new tires from the wholesale house. The job was temporarily held up. Mr. Schneider, the boss, told applicant and the other workmen to go to supper. Applicant said he would go as soon as he loosened the bolts and nuts on the rear wheels. (Applicant Tr. 1, p. 4 and 14. Grover Tr. 2, p. 3-5 and 12. Costly Tr. 2, p. 14.) Mr. Schneider and the other two employees went away. Nothing was said to applicant to the effect that he should wait at the garage until Schneider returned. (Tr. 1, p. 49.)

Applicant finished loosening the bolts and nuts on the wheels. Then he talked with Mr. Fox who was in charge of the lubricating department and who was the only other employee of the tire company then in the service department and under whom applicant worked part of the time. He asked Mr. Fox about using the motorcycle for going home. Mr. Fox said his car was on the grease rack and then applicant went to the motorcycle which was on the open court as usual. Mr. Fox asked him if he was going to use the motorcycle and he answered yes. He had trouble starting the motor and one of the boys in the gas station department helped him start it and he went home. It was then about 8:15 p. m. (Tr. 1, pages 4 and 10.) The motorcycle was the only means applicant had of getting home. (Tr. 1, p. 15.)

The motorcycle was owned by the defendant tire company, was kept on the open court of the service station

where all employees had access to it, and was, as a matter of fact, used by several of the employees of the service departments. No one states how many of employees actually used it. No where in the record is it shown that this applicant was told not to use it. Applicant had been encouraged by a regular employee to learn to use it, and this employee, Mr. Fox, in charge of the lubricating department, had taken applicant out two times on the motorcycle to show him how to use it and applicant had taken it out twice by himself and had once ridden it around in the open court of the service station in plain view of every person there at the time. (Tr. 1, p. 6.) All this occurred in the course of six days. (Tr. 1, p. 5.) These circumstances are sufficient to charge Mr. Schneider, the man in charge of the service department, with knowledge that applicant was using the motorcycle. However, that need not be left to conjecture. On one occasion, two days before the injury, Mr. Schneider actually talked to applicant about riding the motorcycle. (Tr. 1, pages 8 and 12.) Mr. Schneider on that occasion told applicant to make a delivery on the motorcycle.

Applicant, on the motorcycle, went directly to his home. When he stopped in the driveway of his home his younger sister came out and asked him to give her a ride—she climbed on the tool box and applicant drove her around one block. Applicant estimates the time consumed by the sister's ride as three minutes. (Tr. 2, page 18 and 22.) No street was crossed on the trip. From the time applicant first drove into the driveway and pulled out after eating his dinner was about ten minutes. (Tr. 2, p. 20.) His dinner was on a plate in the warming oven when he reached home. He ate

“a few bites” and started back for the garage and was injured a short distance from his home.

Applicant had trouble with the motorcycle from the time he started the machine. It went to the left of the road all the time. He came upon a parked car facing east on the south side of the road and he could not turn the motorcycle to the right, so he turned it to the left as sharp as he could but still hit the fender of the parked car, then he lost control of the motorcycle and it ran into the corner of a house. (Tr. 1, p. 4.)

In order that there may be no question that applicant was not dismissed at the time of the injury and that Mr. Schneider declined to say that applicant was not in line of his duty in going home to get dinner, we reproduce the following questions put by Commissioner Jugler and answers thereto by Mr. Schneider. (Tr. 1, pages 37 and 38.):

Q. Mr. Harris' usual duties were nine in the morning to six in the evening?

A. Yes, that is when we bring the extra man on to work.

Q. His wages during that period were two and a half a day?

A. I don't know what his wages were. I know when I started there almost three years ago that is what I was paid. We never saw each others checks.

Q. They paid additional for over time?

A. They paid the extra man by the hours.

Q. Mr. Harris' duties on this particular day would not be complete until the wheels of the trucks were changed:

A. That is right.

Q. You don't know to how late he was paid that day?

A. No.

Q. His work was not completed at the time of the accident?

A. No, it was not.

Q. Did it ever happen that a man has left a job and gone to eat without specific instructions and come back and completed his work:

A. Not that I know of.

Q. They stay through until they are told to go and eat?

A. They must stay until the work is done or they are instructed to have lunch and if the work is not done to come back and finish.

Q. Was Mr. Harris in the line of duty going home to get dinner?

MR. DAY: I object to that as a conclusion.

COM. JUGLER: He is a boss?

A. There were no errands for the institution for Mr. Harris to run at that time.

Q. I beg your pardon?

A. There were no deliveries or errands for the company at that time.

Q. His work was on the truck to complete this job on the truck?

A. Yes.

Q. And his day was not over until that job was complete?

A. Yes, or so we could handle it, but he was supposed to be on the job.

Q. He was not dismissed?

A. No, not by instructions.

As near as can be determined from all the evidence the injury was received by applicant very close to 8:30 p. m., May 8, 1939. At the time of the first hearing before the Industrial Commission, July 20, 1939, no pay had been given applicant for his work on May 8th. (Tr. 1, p. 20.) Com-

missioner Jugler requested Mr. Schneider who was in charge of the station that night to file a copy of the time sheet for that day. (Tr. 1, p. 41.) There is in the record a letter dated July 20th and marked received by the Industrial Commission July 22d, (Item 7 of the record) which this court will note is two and one-half months after the date of the injury and two days after the completion of the first hearing, attached to which is what purports to be applicant's time sheet for that day.

This time sheet besides being "a receipt in full for all compensation or otherwise" apparently shows that \$3.28 is due applicant for ten and one-half hours—from "5-7 to 5-13-1939." Presumably the ten and one-half hours is for the regular shift up to six or 6:30 o'clock, and two and one-half hours overtime thereafter on May 8, 1939. Mr. Schneider whose duty it was to turn in applicant's time and who was in charge of the garage that night, said he returned to the garage about "8:30 or 9:00. They told me that Mr. Harris had wrecked the motorcycle and they told me where it was." (Tr. 1, p. 33.)

From this time sheet it is apparent that applicant's employers attempted to stop his overtime not when he was sent out to eat but as near as they could fix it at the very instant of the injury. In other words he was in the course of his employment when he left the garage on the motorcycle, while he ate "a few bites," while he started back and while he traveled back toward the garage and up to the very instant of the injury. At that instant he was on his own time and no longer in the course of his employment.

PLAINTIFF'S REQUEST FOR RULING ON MOOT CASE

Plaintiffs seem disturbed about whether or not the tire company would be liable in damages if applicant while going home or returning to the garage that night had caused damage to person or property. (pp. 26-27-28-29 plaintiff's brief.) They ask the advice of the Supreme Court upon this question. Their own witness testified in answer to Mr. Day's question that there was no damage to the house that was struck by the motorcycle, (Tr. 3, p. 6) and there is not a suggestion in the record or at all that any damage was caused to any person or property, except to the applicant and to the motorcycle.

In advance of a case filed the Supreme Court is asked how it would rule if a case were filed.

EVIDENCE OF PERMANENCE OF INJURY

August 10, 1939, after the first hearing in the case, and three months after the injury, the Industrial Commission rendered its decision in which it found:

“The applicant required medical and hospital service and treatment and was disabled from work for a period of time; he now suffers some permanent partial loss of the use of his left leg below the knee as a result of the injury of May 8, 1939.”

July 20, 1939—first hearing.

Dec. 13, 1939—first re-hearing.

March 4, 1940—second re-hearing.

On each occasion applicant appeared in person before the Commission and on the first two occasions testified orally.

May 27, 1940, the Industrial Commission, after two re-hearings at the request of plaintiff, adopted the following resolution after reciting the three hearings and the decision of August 10, 1939:

“Now, therefore, be it resolved and ordered that the Commission’s decision of August 10, 1939, be and the same is hereby reaffirmed and approved as the Commission’s decision herein.”

The record also shows that on May 19, 1939, Dr. C. L. Shields, attending physician, reported that applicant suffered:

“Compound comminuted fracture of left tibia and fibula with three lacerations where bone protruded through the skin into the dirt. Dislocation of the ankle joint and marked destruction and tearing of tissues on the extensor surface”;

also

“After thorough cleansing bones well approximated and held in place with Thomas splint. This caused so much swelling and pain in foot that leg was placed in Zizner frame and held in place by weight and Kirschner wire thru tibia and fibula.”

The hospital bills filed with the Commission showing the length of the various periods applicant remained in hospital were also before the Commission.

In view of Section 42-1-82 of the Revised Statutes, 1933, this record of the injury and the commission’s opportunity to

see the applicant on several occasions certainly furnishes ample bases for a finding by the Commission on August 10, 1939, and its affirmance on May 27, 1940 that applicant "now suffers some permanent partial loss of the use of his left leg below the knee."

Section 42-1-82 expressly provides that "The Commission shall not be bound by the usual common-law or statutory rules of evidence or by any technical or formal rules of procedure other than as herein provided;"

The powers of the Industrial Commission are continuing (Revised Statutes, 1933, Section 42-1-72) and changed conditions may be investigated at any time and the amount of compensation changed accordingly. Even the annulment of this award because of inadequate evidence of the extent or permanence of disability would not prevent the Commission taking further evidence and fixing the amount of compensation.

McGary vs. Industrial Commission, 64 Utah 592.
State Road Commission vs. Industrial Commission, 56 Utah 252.

Salt Lake City vs. Industrial Commission, 61 Utah 514.

CONCLUSION

No question of jurisdiction arises in this case. In every detail the award is supported by substantial evidence in the record. For the reasons given we respectfully submit that

the award of the Industrial Commission of Utah to Lee James Harris should be affirmed.

Respectfully submitted,

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